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No. 86-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Conditional Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

REPLY BRIEF AND APPENDIX IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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REPLY TO ARGUMENTS FIRST RAISED IN THE BRIEF OF RESPONDENT JANE HODGSON IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

Pursuant to United States Supreme Court Rule 22.5, Defendants[1] submit this reply to arguments first raised in the brief in opposition to their cross-petition for certiorari.

As set forth in the Defendants' Conditional Cross-Petition for Writ of Certiorari, if the Court determines to grant the writ on petition of the Plaintiffs who prevailed in the district court below, Defendants must be entitled to full consideration of the issues they have raised on appeal to the circuit court, including the following question:

> May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor woman under the age of 18 at least 48 hours before performing an abortion upon their daughter?

In her Brief in Opposition to Defendants' Conditional Cross-Petition for Writ of Certiorari, Plaintiff Jane Hodgson has interjected the argument that the cross-petition should not be granted to entertain the foregoing question because Defendants allegedly conceded in the district court that a parental notification requirement does not differ constitutionally from a parental consent requirement[2] and because Defendants never briefed this question in the district court.[3]

This argument is incorrect in both respects.

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[1] For the sake of convenience and uniformity with the documents previously filed in this case and in case no. 86-882, the parties will be denominated with reference to their posture in the district court where Respondents Hodgson, *et al.* were Plaintiffs and the State, *et al.* Defendants.

[2] Brief of Respondent Jane Hodgson in Opposition to Cross-Petition for Certiorari at 4.

[3] *Id.*

I. DEFENDANTS DID NOT AGREE IN THE DISTRICT COURT THAT A PARENTAL NOTICE REQUIREMENT IS THE CONSTITUTIONAL EQUIVALENT TO A PARENTAL CONSENT REQUIREMENT.

Plaintiff Jane Hodgson notes that the court below observed that "[t]he parties agreed in response to a question from the Court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements."[4]

In a memorandum in opposition to Plaintiffs' motion for preliminary injunction dated August 28, 1981, in a pre-trial statement dated February 3, 1986, and in a post-trial brief dated May 19, 1986, Defendants never conceded or agreed that the constitutional analysis pertaining to the alleged burden imposed by a consent requirement *standing alone* was equivalent to that applicable to a notice requirement *standing alone*, and, indeed, Defendants specifically argued to the contrary.[5] For example, as stated by Defendants in their post-trial brief:

> There is also no reason to believe that the parental notification requirement of subdivision 2 will be unduly burdensome. In the first place, unlike the parental *consent* requirement held invalid in *Planned Parenthood v. Danforth, supra*, the parental notification requirement of the Minnesota statute does not give parents or any third person the power to veto a minor woman's abortion decision by withholding consent.[6]

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[4] Appendix to Petition of Jane Hodgson, *et al.* for Writ of Certiorari (No. 86-882) at 97a.

[5] *See* Appendix to Cross-Petitioners' Reply Brief in support of conditional Cross-Petition for Certiorari (hereinafter "Reply Appendix") at RA-2 - RA-9; RA-13 - RA-19.

[6] Reply Appendix at RA-17 (emphasis in original).

In light of the foregoing, the district court's observation about the parties' agreement as to the constitutional analysis applicable respectively to consent and notice requirements is simply erroneous to the extent, if any, that it implies, or is claimed to imply, that Defendants conceded that a notice requirement, standing alone, would be considered constitutionally identical to a consent requirement standing alone.

Defendants did argue in the district court that the constitutional analysis of a consent requirement *coupled with a court bypass option*, such as was undertaken by this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979), and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983), was applicable in the instant case involving a notice requirement coupled with a court bypass option. Thus, in their post-trial brief Defendants discussed the *Bellotti* and *Ashcroft* decisions at length[7] and argued that:

> Although the decisions discussed above involve judicial bypass procedures as an alternative to parental consent, they are also applicable to parental notification statutes. Since the requirement of parental consent is more of a burden than the requirement of parental notification, any parental notification/judicial bypass procedure that meets the constitutional test established for a parental consent statute would be a *fortiori* constitutional.[8]

Defendants' argument in the district court that any notification/judicial bypass procedure that meets the constitutional test established for parental consent/judicial bypass procedure would be *a fortiori* constitutional is altogether consistent

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[7] Reply Appendix at RA-19 - RA-22.

[8] Reply Appendix at RA-22. Defendants also made this same argument in their Summary Judgment Memorandum. Reply Appendix at RA-13.

with Defendants' arguments in the district court that the constitutional analysis of a parental consent requirement standing alone is not applicable to the constitutional analysis of the alleged burdens imposed by a parental notification requirement standing alone. Nor does that argument represent any concession whatever by Defendants that notification requirements and consent requirements are similar in constitutional terms.

II. THE QUESTION WHETHER A STATE MAY CONSTITUTIONALLY REQUIRE A PHYSICIAN TO ATTEMPT WITH REASONABLE DILIGENCE TO NOTIFY THE PARENTS OF AN UNEMANCIPATED MINOR WOMAN UNDER THE AGE OF 18 AT LEAST 48 HOURS BEFORE PERFORMING AN ABORTION UPON THEIR DAUGHTER WAS FULLY BRIEFED BY DEFENDANTS IN THE DISTRICT COURT.

The argument of Plaintiff Jane Hodgson that the Defendants never briefed the issue whether a notice requirement, standing alone, is constitutional is also without factual foundation. In a memorandum in opposition to Plaintiffs' motion for preliminary injunction dated August 28, 1981, in a pretrial statement dated February 3, 1984, and in a post-trial brief dated May 19, 1986, Defendants extensively and repeatedly briefed the question whether a state may constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor woman under the age of 18 at least 48 hours before performing an abortion upon their daughter.[9]

In like fashion, contrary to the assertion of Plaintiff Hodgson, Defendants, on a number of occasions, argued the reason-

[9] Reply Appendix at RA-2 - RA-9; RA-13 - RA-19.

ableness of the notice requirement as a narrowly tailored means to effectuate the lawful interests of both the state and parents in the care and upbringing of children.[10]

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Conditional Cross-Petition for a Writ of Certiorari, Conditional Cross-Petitioners respectfully urge that, if certiorari is granted in *Hodgson v. State* (No. 86-882) before judgment in the court of appeals, the Court grant full review of all issues raised by Defendants in the court of appeals.

Respectfully submitted,

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[10] Reply Appendix at RA-2 - RA-9; RA-14; RA-15 - RA-17.

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APPENDIX

[EXCERPTS FROM STATE DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION DATED AUGUST 28, 1981]

* * * * *

C. The Notification Act Serves Both the Rights of Children and Parents.

Before proceeding to analyze the direct application of these factors to this case, it is important to take note of the totality of rights that are affected by the decision on this motion. Plaintiffs' presentation posits a single "fundamental right" (the right of a woman to decide on abortion) against which all things must be measured in terms of interference. In reality, there are a number of rights as well as duties and liberties, some of important stature, which need to be harmonized in the circumstances of this case. These are:

1. The rights and duties of parents with respect to the care, nurture and guidance of their children and the right of minors to the care, nurture and guidance of their parents even in those situations where they do not perceive the benefit to be secured thereby. [-11-]

2. The liberty of physicians to practice their profession with the exercise of their best professional judgment.

3. The power of the state to provide for the protection and care of its minor citizens and to foster familial relationships.

4. The general right of personal liberty which has been held to include the right of competent women in general to make and carry out informed choices concerning abortion.

The powerful, natural and legal rights and obligations of parents toward their minor children are virtually as old as civilization. The existence and necessity for these rights have been strongly asserted by the courts since this nation was founded as stated in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972):

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, *supra*, 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, *supra*, 316 U.S., at 541, 62 S.Ct., at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

This revered and protected function of parents extends into virtually every area of the child's life. So important is this role of parents and family that any interference therewith by the state or third persons is tolerated only in situations of necessity. Plainly, these rights are not based upon simple

legislative or judicial expressions of policy but are firmly grounded in the Constitution itself. *See, e.g., Roe v. Wade,* 410 U.S. 133, 151 (1973); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Pierce v. Soc. of Sisters,* 268 U.S. 510 (1925). Thus, natural parental rights may [-12-] be terminated only where unfitness of the parent is established in accordance with full due process safeguards. *See, Stanley v. Illinois,* 405 U.S. 645 (1972).

The right of the parent to shape the child's values and life style have been generally found beyond the control of the state or of well-meaning officials or third persons proposing to have a child's "best interests" at heart. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972). Thus, it is only where a compelling need to safeguard the safety or welfare of a child has been identified or an important need of society is demonstrated that parents are denied the right to determine and strive for what they believe to be best for their children based upon their natural affection and concern and familiarity due to intimate continuous contact, with the unique aspects of their lives and course of development.

Based upon generations of experience, the law plainly recognizes the parents of a child as the persons most likely to act out of a genuine concern for the child's interests and possessed of the knowledge of the child necessary to wisely make such judgments.

* * * * * [-13-]

Finally, the powers and obligations of the State must be considered. The people of the state possess the power to legislate through their legislators the protection of the rights and general welfare of its citizens to the full extent that such power is not denied by the United States Constitution. This power includes the power in certain circumstances reasonably to limit the freely chosen actions of individuals for their own

protection and to assure that the choice of action is well considered by them or on their behalf. Nowhere is this authority more pronounced than in the states' well-established power to perpetuate the institution of the family and the rights and obligations of parents for the care, oversight and training of minor children. Concomitant is the power to reasonably define the period of minority during which such parental rights and obligations exist and during which children are not automatically permitted to exercise autonomy in carrying out actions in their own self-determined "best interest" even in cases where their freedom of action as an adult would be unquestioned. *See, e.g., Ginsberg v. New York,* 390 U.S. 629 (1968); *Bellotti v. Baird,* —— U.S. ——, 99 S.Ct. 3035 (1979).

The people, through their elected officials, thus determine that, during the period of minority, parents shall be relied upon to make judgments concerning not only actions of their children but the point at which the children should be permitted to choose for themselves.

Therefore, the issue presented here is not simply one of evaluating a claimed interference by the state with a single constitutionally based right. Rather, the Act must be viewed in terms of balanced accommodation of competing rights with equivalent constitutional basis, in which all such fundamental rights are to be protected to the greatest degree possible. The Notification Act under consideration represents the consideration and balancing of these rights by the Minnesota legislature. [-15-]

* * * * *

2. Plaintiffs Should Not Prevail on the Merits

There is no question that the Notification Act is facially constitutional. The Supreme Court in *H.L. v. Matheson,* —— U.S. ——, 101 S.Ct. 1164 (1981), upheld a Utah statute providing for parental notice prior to abortion upon any unmar-

ried minor. The question not squarely answered by that case is whether such a statute might be invalid in certain circumstances as applied to individual minors who are "mature" or whose "best interests" may not be served by parental notification.

In *Matheson*, it is plain that only Justices Marshall, Brenner and Blackmun voted to strike down an all inclusive parental notification act outright. 101 S.Ct. at 1179.

Justices Powell and Stewart, in concurrence upholding the Utah statute, expressed the view that the state could not require notification "in all cases" without providing some means of independent review. 101 S.Ct. at 1173. The sum of their view was that a rule either providing for notice in *all* cases or none was too inflexible.

However, Justice Stevans expressed very clearly that a simple notice requirement cannot be equated with an absolute veto of the minors abortion decision. 101 S.Ct. at 1177. In his view, the state's interest in protecting the minor from an incorrect abortion decision justifies the notification statute. *Id.* at 1179. Accordingly, he would have reached the question reserved by the court and upheld the constitutionality of the statute.

Ultimately, of course, *Matheson* reserves the questions presented in this case by the application of subdivision 2 to mature or best interests minors. Given the split in opinions of the Supreme Court, the question is left to analysis by the lower courts [-19-] based on their own appreciation of the proper balance of the rights involved and a state legislatures authority to strike the proper balance of those rights.[13]

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[13] The split nature of the court is further emphasized by the dissenting opinions of Chief Justice Burger and Justices White and Rehnquist in Planned Parenthood v. Danforth, 428 U.S. 52, 92

Following *Matheson* a panel of the Eighth Circuit Court of Appeals in *Planned Parenthood of Kansas City v. Ashcroft*, Nos. 80-1130, 80-1530 (8th Cir., July 8, 1981), upheld a Missouri statute requiring parental consent to minors' abortions and providing an alternative procedure for obtaining court approval. The court, however, went on in the space of two pages to dispose of the issue, expressly left undecided by *Matheson* finding "no need to analyze the problem at length . . . ." Slip. Op. at 17. Thus, the circuit panel concluded that a parental notice requirement in the context of a parental consent was "unduly burdensome" as applied to so-called "mature" or "best interest" minors. *Id.* at 18.

Neither *Matheson* nor *Ashcroft*, however, should compel this Court to determine that subdivision 2 of the Notification Act is invalid. Instead, the analysis of the problem which the circuit declined to pursue leads to the conclusion that the notice requirement, as contained in subdivision 2 of the Act, survives constitutional attack because it is supported by compelling interests and is drawn in the narrowest terms which will serve those interests while imposing the least conceivable burden on the ultimate decision.

Plainly the Supreme Court has recognized that the interests of the state in protecting its young from rash and perhaps improvident actions and in preserving the traditional role of parents in raising, directing and caring for the needs of their children as sufficiently compelling to require not only parental notice but also consent as a general rule. *See, Bellotti v. Baird*, [-20-] *supra*. As applied to parental consent, the Court has determined that an escape hatch procedure is called for to

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(1976) in which they would have upheld even an absolute requirement of parental consent for minors to obtain an abortion. *See also*, Roe v. Wade, 410 U.S. 113, 117, 221 (1973) (White J. and Rehnquist J. dissenting).

avoid absolute parental veto (the ultimate burden) upon the abortion decision. *Id.*

Plainly, however, the burden of mere notice, the most elemental component of due process of law, can . . . not be equated with the burden of consent and the potential veto of the minor's decision. *H.L. v. Matheson,* —— U.S. ——, 101 S.Ct. 1166, 1177 (1981) (Stevens, J.). Even as noted by Justice Powell concurring in *Carey v. Population Services International,* 438 U.S. 678 (1977):

> Requiring minors to seek parental guidance would be consistent with our prior cases. In *Planned Parenthood,* we considered whether there was "any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person *in loco parentis* that is not present in the case of an adult." 428 U.S., at 75, 96 S.Ct., at 2844. Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it imposed "a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and [did] so without a sufficient justification for the restriction." *Ibid.* But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. *Ibid.,* citing *Bellotti v. Baird,* 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). See *Planned Parenthood, supra,* 428 U.S., at 90-91, 96 S.Ct., at 2850-2851 (Stewart, J., concurring).
>
> A requirement of prior parental consultation is merely one illustration of permissible regulation in this area.

Therefore, the constitutional need for an alternative to parental consent does not lead to the same need with respect to mere notice. Indeed, it is difficult to imagine a restriction upon the unfettered freedom of action of minors which at the same time serves such a compelling need as the mere requirement of notice to the parents whose interests are second only to those of the minor herself.

The issue presented here differs from that in the parental consent cases not simply in degree but in its very substance. This substantive difference leads to the conclusion that any effort to [-21-] find a constitutional exemption for so-called "mature" or "best interest" minors leads to dilemmas which cannot be resolved.

Briefly stated there is no way to effectuate the compelling interests of the state and parents in protecting minor children in general without providing at least notice to the parents in all cases not exempted by the Act. That such notice may in certain individual cases apply to minors who are "mature" or whose individual "best interests" may not thereby [be] served is an unavoidable consequence of protecting those who are not "mature" and whose interests would be so served, and of providing some due process to parents in affecting their fundamental rights.

* * * * * [-22-]

[EXCERPTS FROM DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT DATED MAY 1, 1984]

ARGUMENT

I. THE MINNESOTA ABORTION NOTIFICATION ACT, WITH THE JUDICIAL BYPASS PROCEDURE OF SUBDIVISION 6 IN EFFECT, DOES NOT VIOLATE DUE PROCESS.

A. Facial Constitutionality.

In refusing to preliminarily enjoin the judicial bypass version of the Minnesota Abortion Notification Act in March of 1982, this Court specifically concluded that the act, with the judicial bypass procedure in effect, is probably constitutional on its face.[15] This tentative conclusion was sound then and remains correct today.

The Constitution does not forbid all state regulation of the abortion decision, either during the first trimester or thereafter. The personal privacy right to choose abortion rather than child birth "is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. 113, 154 (1973). As the Supreme Court has made clear, "*Roe* did not declare an unqualified 'constitutional right to an abortion,' . . . . Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (emphasis added).

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Supreme Court held invalid a provision of a Missouri statute

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[15] District Judge Alsop's order of March 22, 1982, Conclusion of Law No. 5.

that [-18-] required an unmarried minor seeking an abortion to obtain advance parental consent. On the same day, the Court decided *Bellotti v. Baird*, 428 U.S. 132 (1976) (*"Bellotti I"*), involving the constitutionality of a Massachusetts parental consent statute. Unlike the Missouri statute, however, the Massachusetts statute provided that in lieu of parental consent, a pregnant minor could obtain an abortion by order of a Massachusetts superior court for "good cause shown." A three-judge court had held the statute unconstitutional. The Supreme Court vacated the judgment and remanded with instructions to certify certain questions of statutory interpretation to the Massachusetts Supreme Judicial Court. 428 U.S. at 146-52.

After the statute had been construed by the Massachusetts Court, the Supreme Court addressed its constitutionality in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*"Bellotti II"*). Although the Massachusetts judicial bypass procedure "satisfied constitutional standards in large part," 443 U.S. at 651, and "avoided much of what was objectionable in the statute successfully challenged in *Danforth*," *id.* at 645, the Court found two constitutional flaws. First, the Massachusetts statute permitted judicial authorization for an abortion to be withheld from a minor who was found by the hearing court to be mature. Second, it required parental consultation or notification in all instances without giving the young woman an opportunity to receive an independent judicial determination of whether she is sufficiently mature to consent to an [-19-] abortion or whether an abortion would be in her best interests. 443 U.S. at 651. Justice Powell announced the judgment of the Court and delivered a plurality opinion joined in by three other justices. In the course of explaining the shortcomings of the Massachusetts statute, the Powell plurality opinion took pains to discuss possible alternative judicial bypass proce-

dures "to provide some guidance as to how a state constitutionally may provide for adult involvement . . . in the abortion decisions of minors." *Id.* at 651 n. 32. In providing such guidance, Justice Powell's plurality opinion set forth the specific constitutional standards that any judicial bypass statute must satisfy:

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desire to have an abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeal that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 647-48 (footnotes omitted).

Although the constitutional standards enumerated in Justice Powell's plurality opinion in *Bellotti II* are dictum, they represent the considered view of four justices and are thus to be [-20-] accorded great weight. Since Justice White dissented on the ground that he found the statute then before the Court to be constitutional, it is plain that any judicial bypass procedure satisfying the standards of Justice Powell's plurality opinion would also be constitutional in Justice White's view and would therefore command a clear majority of the court.

It is thus not surprising that the standards set forth in Justice Powell's *Bellotti II* plurality opinion have been specifically endorsed and applied in a number of subsequent decisions to uphold the constitutionality of particular judicial bypass procedures. Of particular significance is the Supreme Court's recent decision in *Planned Parenthood Ass'n. v. Ashcroft*, —— U.S. ——, 103 S. Ct. 2517 (1983), in which the Court affirmed the constitutionality of a Missouri judicial bypass statute conforming to the constitutional standards previously enunciated in *Bellotti II*. —— U.S. at ——, 103 S. Ct. at 2526. *See also Planned Parenthood Ass'n. v. Ashcroft*, 655 F.2d 848, 857-58 (8th Cir. 1981); *Planned Parenthood League v. Bellotti*, 641 F.2d 1006 (1st Cir.), *aff'g in relevant part*, 499 F. Supp. 215 (D. Mass. 1981). In summary, the constitutionality of Minnesota's judicial bypass procedure is to be measured by the standards announced in *Bellotti II*.[16] [-21-]

[EXCERPTS FROM DEFENDANTS' STATEMENT OF THE CASE DATED FEBRUARY 3, 1986]

* * * * *

LEGAL ISSUES

I. CONTENTIONS OF THE PARTIES CONCERNING THE PARENTAL NOTIFICATION REQUIREMENT OF SUBDIVISION 2.

Plaintiffs contend that the parental notification requirement of subdivision 2 violates due process by unduly burden-

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[16] Although the decisions discussed above involve judicial bypass procedures as an alternative to parental consent, they are also applicable to parental notification statutes. Since a requirement of parental consent is more of a burden than a requirement of parental notification, any parental notification/judicial bypass procedure that meets the constitutional test established for a parental consent statute would be *a fortiori* constitutional.

ing a minor's right to have an abortion. More particularly, plaintiffs assert that the statutory parental notification requirement is unduly burdensome because (1) it does not serve any legitimate state interest, and (2) some parents may be abusive or obstructionist upon receiving notice of their daughter's abortion decision, thus effectively denying an effective opportunity for an abortion to be obtained.

Defendants contend that the statutory parental notification requirement does further a substantial state interest and does not unduly burden a minor's right to choose an abortion. The State has a substantial interest in providing for the care, nurture, education and upbringing of its citizens for a reasonable period of time after birth and infancy, and parents of minor children have a substantial, fundamental interest in the custody, care, upbringing and education of their minor children. In particular, the State has a substantial interest in promoting parental involvement in a minor's decision whether or not to have an [-4-] abortion, and the parental notice requirement is reasonably calculated to further the interest of parental involvement. Defendants further contend that the parental notification requirement of subdivision 2 is not unduly burdensome to minors because it does not permit a parental veto, and Minnesota law provides adequate means to protect minors from abusive parents.

* * * * * [-5-]

[EXCERPTS FROM DEFENDANTS' POST-TRIAL BRIEF DATED MAY 19, 1986]

* * * * *

ARGUMENT

I. PLAINTIFFS' CLAIMS CONCERNING THE PARENTAL NOTIFICATION REQUIREMENT OF SUBDIVISION 2 ARE WITHOUT MERIT.

A. The Parental Notification Requirement Of Subdivision 2 Satisfies Due Process.

The Constitution does not forbid all state regulation of the abortion decision, either during the first trimester or thereafter. The personal privacy right to choose abortion rather than child birth is "not unqualified and must be considered against important State interests and regulation." *Roe v. Wade*, 410 U.S. 113, 154 (1973). As the Supreme Court has made clear, "*Roe* did not declare an unqualified 'constitutional right to an abortion,' . . .[-26-] Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (emphasis added). As measured by these standards, the parental notification requirement of subdivision 2 does not offend due process.

In the first place, the parental notification requirement of subdivision 2 may serve a number of legitimate state interests. A state, if it so chooses, may encourage child birth rather than abortion. *Cf. Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). The State may also have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (1977). Parents also have "traditional and substantial interest in, as well as the responsibility for, the rearing and

welfare of their children especially during immature years." *H. L. Matheson*, 450 U.S. 418, 420 (1981) (Powell, J., concurring).

Perhaps most importantly, however, it is well settled that the State has a significant and substantial interest in protecting the well-being of pregnant minors from improvident abortion decisions and, more particularly, in fostering parental consultation in order to assist the minor in making her decision as wisely as possible. *H. L. Matheson, supra*, 450 U.S. at 410-11, 419-20, 422-24; *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (Stewart, J., concurring). As stated by four justices in *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979), quoting *Planned Parenthood v. Danforth, supra*, 428 U.S. at 91: [-27-]

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

In light of the foregoing, it is apparent that the parental notification requirement of subdivision 2 serves legitimate and important State interests.[6]

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[6] While Minn. Stat. § 144.343, subds. 2-7, does not contain a statement of its purposes, many of its purposes are apparent from its language, including the fostering of parent-child relationships, assuring counsel to the child in a difficult and traumatic choice, and assuring that notice is given to those who are naturally most concerned for the child's welfare. Obviously, these were among the

There is also no reason to believe that the parental notification requirement of subdivision 2 will be unduly burdensome. In the first place, unlike the parental *consent* requirement held invalid in *Planned Parenthood v. Danforth, supra,* the parental notification requirement of the Minnesota statute does not give parents or any third person the power to veto a minor woman's [-28-] abortion decision by withholding consent. Moreover, the parental notification requirement in the Minnesota Statute is narrowly drawn to reach as a general matter only those situations where parental notification would be potentially useful or practicable. Specifically, parental notification is not required for "emancipated" minors, i.e., those minors who live apart from their parents or guardians, who manage their own financial affairs, who have been married or who have born a child, or who are otherwise beyond the custody and control of their parents. Furthermore, subdivision 3 of the Act provides that only one parent need be notified if the second parent cannot be located through a reasonably diligent effort. The statute also excuses parental notification in cases of life-threatening medical emergency.

Plaintiffs assert that the parental notification requirement is unduly burdensome primarily because there exist certain bad parents who would abuse their child if informed of her

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goals of the author of the bill, Senator Waldorf, who when presenting the bill for the full Senate stated his reasons for the act, endorsing much of what was said in *H. L. v. Matheson, supra.* Among his reasons were the "longstanding position that the custody, care and nurture of the child reside first in the parents whose . . . guiding role includes counseling them on important decisions. These decisions include physical, emotional, and spiritual health of the child. The parent, if he or she knows can supply medical history, ensure an informed decision on the part of the minor and include the moral implications of the decision." D. Exh. S. 70-72.

decision to have an abortion. There undoubtedly exist a small minority of parents who, with or without excuse, abuse their children. This tragic phenomenon does not, however, render the parental notification requirement unconstitutional. Minnesota's parental notification statute takes care to provide that parental notice is not required whenever a minor reports that she is a victim of sexual or other physical abuse or neglect as defined in Minn. Stat. § 626.566. Furthermore, sexual or physical abuse or neglect of children is otherwise not tolerated in Minnesota law, and means exist to prevent and deal with such abuse. *See* Minn. Stat. §§ 626.556, 260.131-260.251. [-29-]

Moreover, the fact that some small minority of parents do not necessarily act in their children's best interests would not serve to invalidate a statute seeking to provide minor children facing an important life decision with the benefits of parental involvement, consultation and guidance. As declared by the Supreme Court in *Parham v. J. R.*, 442 U.S. 584, 602-03 (1979):

> Jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that nature bonds of affection lead parents to act in the best interests of their children.
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> . . .

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . ., creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.

So, too, in the present case, Minnesota's parental notification rule should not be cast out merely because some parents may at times act against the interests of their children, particularly since the statute itself does not require notice of a child who declares that she is the victim of abusive parents. [-30-]

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II. THE JUDICIAL BYPASS PROCEDURE OF SUBDIVISION 6 HAS BEEN CONSTITUTIONALLY APPLIED.

Irrespective of the constitutionality of subdivision 2, the judicial bypass procedure of subdivision 6 is constitutional on its face, as this court has already ruled in granting partial summary judgment, and the evidence at trial fails to demonstrate that subdivision 6 is being unconstitutionally applied.

A. The Controlling Constitutional Standards.

The specific constitutional standards relevant to plaintiffs' claim that the judicial bypass procedure is unconstitutional as applied are clearly set forth in a series of recent Supreme Court abortion decisions.

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Supreme Court held invalid a provision of a Missouri statute that required an unmarried minor seeking an abortion to obtain advance parental consent. On the same day, the Court decided *Bellotti v. Baird*, 428 U.S. 132 (1976) (*"Bellotti I"*), involving the constitutionality of a Massachusetts parental

consent statute. Unlike the Missouri statute condemned in *Danforth*, however, the Massachusetts statute provided that in lieu of parental consent, a pregnant minor could obtain an abortion by order of a Massachusetts Superior Court for "good cause shown." A three-judge court had held the statute unconstitutional. The Supreme Court vacated the judgment and remanded with instructions to certify certain questions of statutory interpretation to the Massachusetts Supreme Judicial Court. 428 U.S. at 146-52. [-37-]

After the statute had been construed by the Massachusetts court, the Supreme Court addressed its constitutionality in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*"Bellotti II"*). Although the Massachusetts judicial bypass procedure "satisfied constitutional standards in large part," 443 U.S. at 651, and "avoided much of what was objectionable in the statute successfully challenged in *Danforth*," *id.* at 645, the Court found two constitutional flaws. First, the Massachusetts statute permitted judicial authorization for an abortion to be withheld from a minor who is found by the hearing court to be mature. Second, it required parental consultation or notification in all instances without giving the young woman an opportunity to receive an independent judicial determination of whether she is sufficiently mature to consent to an abortion or whether an abortion would be in her best interest. 443 U.S. at 651. Justice Powell announced the judgment of the Court and delivered a plurality opinion joined in by three other justices. In the course of explaining the shortcomings of the Massachusetts statute, the Powell plurality opinion took pains to discuss possible alternative judicial bypass procedures "to provide some guidance as to how a state constitutionally may provide for adult involvement . . . in the abortion decisions of minors." *Id.* 651 n.32. In providing such guidance, Justice

Powell's plurality opinion set forth the specific constitutional standards that any judicial bypass statute must satisfy: [-38-]

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either (1) that she is mature and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desire to have an abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeal that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 647-48 (footnotes omitted).

Although the constitutional standards enumerated in Justice Powell's plurality opinion in *Bellotti II* are dictum, they represent the considered view of four justices and are thus to be accorded great weight. Moreover, since Justice White dissented on the ground that he found the statute then before the Court to be constitutional, it is plain that any judicial bypass procedure satisfying the standards of Justice Powell's plurality opinion would also be constitutional in Justice White's view and would therefore command a majority of the court. It is thus not surprising that the standards set forth in Justice Powell's *Bellotti II* plurality opinion have been specifically endorsed and applied in a number of subsequent decisions to uphold the constitutionality of particular judicial bypass pro-

cedures. Of particular significance is the Supreme Court's recent decision in *Planned Parenthood Ass'n v. Ashcroft,* —— U.S. ——, 103 S.Ct. 2517 (1983), in which the Court [-39-] affirmed the constitutionality of a Missouri judicial bypass statute conforming to the judicial standards previously enunciated in *Bellotti II.* —— U.S. at ——, 103 S.Ct. at 2526. *See also Planned Parenthood Ass'n v. Ashcroft,* 655 F.2d 848, 857-58 (8th Cir. 1981); *Planned Parenthood League v. Bellotti,* 641 F.2d 1006 (1st Cir.), *aff'g in relevant part,* 499 F. Supp. 215 (D. Mass. 1981). In summary, and as expressly recognized by this court in its summary judgment order dismissing plaintiffs' claims concerning the facial constitutionality of subdivision 6, the constitutionality of Minnesota's judicial bypass procedure is to be measured by the standards announced in *Bellotti II.*[9]

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[9] *See* Memorandum Order dated January 23, 1985, at 4-9. Although the decisions discussed above involve judicial bypass procedures as an alternative to parental consent, they are also applicable to parental notification statutes. Since the requirement of parental consent is more of a burden than the requirement of parental notification, any parental notification/judicial bypass procedure that meets the constitutional test established for a parental consent statute would be *a fortiori* constitutional.